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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-929

RSR CORPORATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSHUA F. GREENBERG
425 Park Avenue
New York, New York 10022
(212) 759-8400
Counsel for Petitioner

Of Counsel:

ELIZABETH HEAD
DANIEL D. CHAZIN
Kaye, Scholer, Fierman, Hays
& Handler
425 Park Avenue
New York, New York 10022
(212) 759-8400

December 13, 1979

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Petitioner RSR Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 30, 1979.

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit, filed on July 30, 1979, is reported at 602 F.2d 1317. This opinion superseded an earlier opinion of the court, dated January 8, 1979, which is reported at 1979-1 Trade Cas. ¶ 62,450. The decision by the Federal Trade Commission in this matter, issued on December 2, 1976, and the initial decision of the Administrative Law Judge, issued on April 20, 1976, are reported at 88 F.T.C. 800. The final opinion of the Ninth Circuit, the FTC's opinion and order and the initial decision are reproduced in the Appendix to this Petition.

Jurisdiction

The original opinion of the Court of Appeals (per Pregerson, D.J., sitting by designation), affirming the final decision of the Federal Trade Commission, was entered on January 8, 1979. On July 30, 1979, the Ninth Circuit withdrew its earlier opinion and substituted a revised opinion, but denied RSR's petition for rehearing (189a).[1] On October 18, 1979, this Court (per Mr. Justice Rehnquist) ordered that the time within which to file this petition be extended to December 14, 1979 (190a). This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. For purposes of assessing the likely anticompetitive effect of an allegedly horizontal acquisition under Section 7 of the Clayton Act, may the relevant geographic market be defined to include an area of the country in which the acquiring and acquired companies do not compete?

2. In light of this Court's decision in *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974), may the Federal Trade Commission, in applying Section 7 of the Clayton Act, give decisive weight to market share and concentration statistics, while insufficiently considering post-merger evidence of technological changes in the industry which negate any likelihood that the challenged acquisition will have a substantial anticompetitive effect?

[1] References to pages in the Appendix are abbreviated herein as "(——a)."

Statutory Provision Involved

Section 7 of the Clayton Act, 15 U.S.C. § 18, provides, in relevant part, as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Statement of the Case

This case involves a challenge under Section 7 of the Clayton Act, 15 U.S.C. § 18, by the Federal Trade Commission of the acquisition of Quemetco, Inc. ("Quemetco") by RSR Corporation ("RSR").

Prior to its acquisition of Quemetco, RSR was engaged in smelting and refining lead from scrap materials at two plants—one in Newark, New Jersey, and the other in Dallas, Texas (F. 3, 6a).[2] It had total assets of less than $13 million (F. 4, 6a). RSR's principal product was antimonial lead (F. 7-9, 7a), a metal used primarily in the manufacture of automotive batteries (F. 134-35, 35a).

Before its acquisition by RSR, Quemetco was a wholly-owned subsidiary of St. Joe Minerals Corporation (F. 23, 10a). Quemetco was engaged in smelting and refining lead

[2] The abbreviation "F." is used to refer to Findings of Fact entered by the ALJ, and is followed by a citation to the page(s) in the Appendix where the findings appear.

from scrap materials at three plants—in City of Industry, California, Seattle, Washington, and Indianapolis, Indiana (F. 19, 9a). It had begun constructing two new plants, one in Wallkill, New York, and the other a replacement for its Indianapolis plant (F. 24-26, 10a-12a).

On October 26, 1972, St. Joe Minerals sold all of the outstanding stock of Quemetco to RSR for $22 million (F. 29, 12a-13a).

The Federal Trade Commission issued a complaint on April 1, 1974, alleging that the Quemetco acquisition violated Section 7 of the Clayton Act because its effect may be substantially to lessen competition in the "U.S. lead market" and the "U.S. secondary lead market" (1a-2a). After a trial in 1975, the Administrative Law Judge ("ALJ"), Hon. Montgomery K. Hyun, rendered his initial decision on April 20, 1976 (1a).

The ALJ dismissed the charges relating to the "U.S. lead market," thereby determining that there was no violation in a national market including both primary and secondary lead (F. 336-37, 89a). Complaint counsel did not choose to appeal that ruling. Analyzing likely anticompetitive effects in the alleged market for secondary (recycled) lead, the ALJ found that actual competition between RSR and Quemetco "was confined to the Midwest section of the country" (107a). In that section only, he found that the competition between them was "substantial" and "the acquisition eliminated that competition" in violation of Section 7 (*Id.*). Judge Hyun rejected complaint counsel's request for an order requiring total divestiture of all the acquired assets, including lead plants in Indianapolis, Indiana, Wallkill, New York, City of Industry, California, and Seattle, Washington, as well as a specialty lubricant manufacturing subsidiary in Texas. Instead, he found that divestiture of the one plant in Indianapolis

would be sufficient to restore competition and provide complete relief (111a-115a).

Both parties appealed from the initial decision, RSR urging reversal of the finding of any Section 7 violation and complaint counsel urging more extensive divestiture. On December 2, 1976, the Commission issued its final decision (118a). It agreed with complaint counsel that there was a violation in a nationwide secondary lead market and that a more sweeping order should be entered (150a, 156a-157a). The Commission ordered divestiture of all of Quemetco's premerger assets, except for the plant in Seattle, Washington (166a-167a). The Commission reasoned that "RSR will stay a multi-plant firm with its own Dallas plant along with Quemetco's Seattle smelter, enabling it to sell in the West Coast market (in competition with Quemetco's City of Industry Plant) an area it had not served before the merger" (157a).

RSR appealed the Commission's decision to the United States Court of Appeals for the Ninth Circuit. On January 8, 1979, the Court of Appeals issued an opinion affirming the final decision of the Commission. On July 30, 1979, the Ninth Circuit withdrew its earlier opinion and substituted a revised opinion (171a), but denied RSR's petition for rehearing (189a).[3] This petition seeks review of the July 30, 1979 decision by the Court of Appeals. Pursuant to order of Mr. Justice Rehnquist dated October 18, 1979, RSR's time to petition for a writ of certiorari to review the Court of Appeals' decision was extended to December 14, 1979 (190a).

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[3] The original opinion (p. 14) had distinguished two decisions of this Court which had found narrow geographic markets on the ground that "those cases involved *potential* competition, not *actual* competition, as in the instant case." This statement was deleted from the revised opinion, and the subsequent sentence in the opinion was expanded (183a).

Reasons for Granting the Writ

I

The Court Below Erroneously Held That the Relevant Geographic Market May Be Defined to Include An Area In Which the Acquiring and Acquired Firms Do Not Compete.

The threshold inquiry in determining the legality of an acquisition under Section 7 of the Clayton Act is the proper definition of the relevant market in which the likelihood of anticompetitive impact is assessed. Proper market definition is critical to correct antitrust analysis of any acquisition—and particularly to that of a "horizontal" acquisition of one alleged competitor by another—because effect on competition can be measured only in the context of the competitive arena in which the merging firms confront one another. As this Court established in *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962):

> "Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected." *Id.* at 324, quoting *United States* v. *E.I. duPont de Nemours & Co.,* 353 U.S. 586, 593 (1957).

With respect to the geographic aspect of the relevant market issue—in Section 7's terms, the "section of the country"—this Court has established that the relevant geographic market consists of "the area in which the goods or services at issue are marketed to a significant degree by the acquired firm." *United States* v. *Marine Bancorporation,*

418 U.S. 602, 621 (1974). In so holding, this Court explicitly rejected the view that the legality of a merger could be determined "by measuring its effects on areas where the acquired firm is not a direct competitor." *Id.* This basic principle was reaffirmed in *United States* v. *Connecticut National Bank,* 418 U.S. 656, 667 (1974), in which this Court stressed that the relevant geographic market is the area in which the acquired firm "is in significant, direct competition with other" firms in the industry. This, the Court explained, is because the relevant market "must be drawn narrowly to encompass the area where 'the effect of the merger on competition will be direct and immediate.'" *Id.* at 668, quoting *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 357 (1963).

This fundamental principle is particularly significant in cases involving allegedly horizontal acquisitions. For a horizontal merger cannot be proscribed unless, at the very least, it is likely substantially to eliminate competition between the acquiring and acquired firms; and competition cannot be eliminated in a designated section of the country if the companies in question did not compete to begin with in that area.

In disregard of these controlling precedents and the principle they reflect, the Court of Appeals found that the relevant market in this case was the United States as a whole, despite the undisputed fact that "RSR and Quemetco did not compete in every state" (182a). Indeed, the Federal Trade Commission had accepted the ALJ's finding that nearly all of Quemetco's sales in 1971-72 (the period preceding the merger) were made in only 11 states surrounding its plants, while RSR shipped nearly all of its output to only 13 states (134a). Most significantly, the Commission adopted the ALJ's finding that only seven states in 1971 (five in 1972) received lead shipments from *both* RSR and

Quemetco (F. 206-07, 56a; 161a-162a). Moreover, most of those states where there was any overlap at all received only inconsequential quantities from one or the other firm; the Commission found that in 1971 only Indiana—and in 1972 only Indiana and Illinois—received as much as one percent of each of the two companies' total lead shipments (*Id.*).

Of particular significance is the *total* absence of competition between RSR and Quemetco on the West Coast. As the Commission observed, "RSR did not ship to the West Coast, where Quemetco sold most of the output of its Seattle and City of Industry plants" (134a). The "West Coast market" was described by the Commission as "an area [RSR] had not served before the merger" (157a). In short, the FTC's own findings compel the conclusion that the acquiring and acquired firms were not competitors in the United States as a whole.

Against this factual background, the decision by the Court of Appeals that the United States as a whole is the relevant geographic market conflicts with this Court's admonition in *Marine Bancorporation* that the market must be restricted to "the area in which the goods or services at issue are marketed to a significant degree by the acquired firm." 418 U.S. at 621. Since the facts accepted by the Commission and by the Court of Appeals make it clear that RSR and Quemetco sold largely in different states, the entire country simply cannot be the relevant geographic market.

The Court of Appeals' response to the controlling authority of *Marine Bancorporation* and *Connecticut National Bank* was the statement that the binding force of those decisions was limited to situations which involve "the heavily-regulated banking industry" (183a). But this limi-

tation to regulated industries is without basis. Indeed, this Court in *Marine Bancorporation* took great pains to emphasize that nothing in the Court's previous decision in *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966), conflicted with the "traditional view" that the relevant geographic market means "the area in which the relevant product is in fact marketed by the acquired firm." 418 U.S. at 621 n.20. The *Pabst* case, of course, concerned the unregulated beer industry, not the regulated banking industry; yet this Court made it clear that the same standard would be applicable in both cases. The Ninth Circuit's effort to limit *Marine Bancorporation* and *Connecticut National Bank* to regulated banking cases is untenable.

In sum, the decision of the Court of Appeals on the issue of geographic market is incorrect and in conflict with this Court's most recent decisions. The issue of defining the geographic market in cases under Section 7 of the Clayton Act is certain to arise frequently in future cases. The erroneous view of the court below should be corrected by this Court to avoid other misapplications of controlling doctrine. Further, the sweeping divestiture ordered by the FTC and approved by the Court of Appeals, requiring RSR to divest plants located in sections of the country which RSR had not entered prior to the merger and where there was no competitive overlap with Quemetco, should not be allowed to stand.

II.

Disregarding This Court's Decision In *General Dynamics*, the Court of Appeals Gave Decisive Weight to Market Share and Concentration Statistics, While Insufficiently Considering Post-Merger Evidence of Technological Changes In the Industry Which Negate Any Likelihood That the Challenged Acquisition Will Have a Substantial Anticompetitive Effect.

In *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974), this Court established the fundamental proposition that application of Section 7 of the Clayton Act to a corporate acquisition requires, first and foremost, an informed prediction of the effect the transaction will have on competitive conditions in the relevant market *in the future*. As Mr. Justice Stewart explained:

> "Evidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete. In most situations, of course, the unstated assumption is that a company that has maintained a certain share of a market in the recent past will be in a position to do so in the immediate future. Thus, companies that have controlled sufficiently large areas of a concentrated market are barred from merger by § 7, not because of their past acts, but because their past performances imply an ability to continue to dominate with at least equal vigor." 415 U.S. at 501.

This is because the statute condemns only those acquisitions likely to produce a change in market structure which may substantially lessen competition over time.

Under *General Dynamics*, two points particularly important to proper decision of this case and to future application of Section 7 are clear:

> 1. "[S]tatistics concerning market share and concentration . . . [are] not conclusive indicators of anticompetitive effects: . . . 'only a further examination of the particular market—its structure, history *and probable future*—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.'" 415 U.S. at 498, quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 322 n.38 (1962) (emphasis added).
>
> 2. Post-acquisition evidence of changes in an industry which are beyond the control of the merged companies go "directly to the question of whether future lessening of competition was probable" and should be considered in determining whether Section 7 has been violated. 415 U.S. at 506.

The decision of the Court of Appeals, affirming the FTC's broad divestiture order, disregards both of these important precepts and should be reviewed by this Court to clarify the proper impact of Section 7.

Relying on *United States* v. *Philadelphia National Bank*, 373 U.S. 321, 363 (1963), and without regard for the teachings of this Court's subsequent *General Dynamics* decision, the FTC and the Court of Appeals have treated market share and concentration statistics for 1971 and 1972 (the year preceding and the year of RSR's acquisition of Quemetco) as decisive on the question of anticompetitive effect. The Court of Appeals approved the FTC's conclusion of illegality, based on *Philadelphia National Bank*, because "the RSR/Quemetco merger was inherently likely to lessen competition in the secondary lead industry" (184a). The

determinative factor for both the Court of Appeals and the FTC was the alleged increase of RSR's "market share" as the result of the acquisition to 19.18% and the "share" of the top four secondary lead producers to 72.41% (185a; 140a-142a). Nowhere was there the least recognition of this Court's holding in *General Dynamics* that statistical showings of market share and market concentration are not conclusive indicators of anticompetitive effects. 415 U.S. at 498. Indeed, the Ninth Circuit's decision does not even mention *General Dynamics* in its discussion of "Lessening of Competition" (183a-187a).[4]

Instead, the Ninth Circuit and the FTC relied on cases prior to *General Dynamics*[5] which, by reason of this Court's reaffirmance in that case of the fundamental principles established in *Brown Shoe,* are of limited precedential value. As the court observed in *United States* v. *Culbro Corp.,* 436 F. Supp. 746 (S.D.N.Y. 1977):

> "Although it is true that many horizontal violations have been found on the basis of market shares and concentration alone, *e.g., United States* v. *Von's Grocery Co.,* 384 U.S. 270 . . . (1966); *United States* v. *Philadelphia National Bank,* 374 U.S. 321 . . . (1963), it is also true that when the Supreme Court laid the ground work for § 7 suits it stated that a functional analysis, not simply a statistical analysis, must be employed. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 322 n.38 . . . (1962). In *General Dynamics, supra,* 415 U.S. at 494-98 . . ., the Supreme Court recently reaffirmed, both in word and practice, this principle which until *General Dynamics* had been observed more often in the breach." 436 F. Supp. at 753.

[4] The FTC's opinion does not refer to *General Dynamics* in its discussion of "Anticompetitive Effects," other than to cite it in support of its reliance on concentration figures under the authority of *Philadelphia National Bank* (142a).

To be sure, the FTC and the Ninth Circuit noted two isolated bits of testimony concerning the purported impact of the acquisition (142a-143a; 185a). However, these bear no resemblance to the requirement of *General Dynamics* that there be a qualitative inquiry into the "structure, history and probable future" of the industry. Further, as we have noted, the Ninth Circuit did not even mention *General Dynamics* concerning the standard for appraising legality.

[5] The Court of Appeals, in upholding the FTC's reliance on concentration figures, looked to United States v. Von's Grocery Co., 384 U.S. 270 (1966), and United States v. Pabst Brewing Co., 384 U.S. 546 (1966), as well as *Philadelphia National Bank, supra* (184a-185a).

In this case, the principles laid down in *Brown Shoe* and reaffirmed in *General Dynamics* have once again been "observed . . . in the breach" and a horizontal violation has been found "on the basis of market shares and concentration alone."

Other Circuits have followed a different course, accepting the need to look substantially beyond market share and concentration data to determine probable anticompetitive effect. The Seventh Circuit in *United States* v. *International Harvester Co.,* 564 F.2d 769 (7th Cir. 1977), took into account non-statistical evidence showing that past market-share statistics gave an inaccurate account of a challenged acquisition's probable effect on competition. *Id.* at 773. In *International Harvester,* the Seventh Circuit correctly recognized that, even if market statistics are "the primary index of market power, 'only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.'" *Id.* at 773-74, quoting *Brown Shoe* and *General Dynamics.*

The need to consider other important facts in addition to market share and concentration statistics was also recog-

nized by the Eighth Circuit in *FTC* v. *National Tea Co.*, 603 F.2d 694 (8th Cir. 1979), where the court observed that "while market share is an important indicator of a firm's future competitive strength, other factors may discount its significance." *Id.* at 700. There, as the result of serious marketing problems, present market share was found to be "an inaccurate reflection of [the merged companies'] future competitive strength." *Id.*[6]

In contrast to the recognition by the Seventh and Eighth Circuits of this Court's ruling in *General Dynamics,* the Ninth Circuit failed in this case to follow its principles. This neglect was exacerbated by the Ninth Circuit's misreading of *General Dynamics* on the significance of post-acquisition evidence. The Court of Appeals refused to give proper weight to evidence (as of 1975, three years after the merger) of impending changes in the lead industry which would increase competition between secondary (recycled) and primary lead producers. It rejected RSR's argument that the facts at that time, pointing to the advent of "maintenance-free" automotive batteries, would place lead recyclers in direct competition with primary lead producers and make it unlikely that RSR's holding of the Quemetco plants would have an adverse effect on competition in the future. Instead, the Ninth Circuit reasoned that "post-merger evidence is entitled to only 'extremely limited' weight in refuting charges of anticompetitive effect made in connection with a Section 7 challenge" (179a). In support, the Court of Appeals cited *General Dynamics.* But that decision stands for precisely the opposite point.[7]

[6] *See also* United States v. Citizens & Southern National Bank, 422 U.S. 86, 120-22 (1975); United States v. Consolidated Foods Corp., 455 F. Supp. 108, 134-36 (E.D. Pa. 1978); Shenefield, *Annual Survey of Antitrust Developments—Class Actions, Mergers, and Market Definition: A New Trend Toward Neutrality,* 32 Wash. & Lee L. Rev. 299, 329 (1975) (written just prior to his appointment as Assistant Attorney General in charge of the Antitrust Division).

In *General Dynamics,* this Court emphasized that the most important factor to consider in a Section 7 case is what is likely to happen in the future. In so holding, the Court specifically *approved* the use of post-acquisition evidence, and found such evidence sufficiently compelling in that case to prove that the challenged acquisition would not result in anticompetitive effects. As this Court made clear, such post-acquisition evidence is entitled to great weight where it reflects uncontrollable changes in an industry:

> "In this case, the District Court relied on evidence related to changes in the patterns and structure of the coal industry and in United Electric's coal reserve situation after the time of acquisition in 1959. *Such evidence could not reflect a positive decision on the part of the merged companies to deliberately but temporarily refrain from anticompetitive actions,* nor could it reasonably be thought to reflect less active competition than that which might have occurred had there not been an acquisition in 1959." *Id.* at 506 (emphasis added).

This case presents the very same situation. The development and foreseeable acceptance of the "maintenance-free" battery as of 1975 was an event entirely beyond the control of RSR or any of the other lead producers who are suppliers to the battery industry.

[7] Ash Grove Cement Co. v. FTC, 577 F.2d 1368, 1378-79 (9th Cir. 1978), also relied upon by the Court of Appeals for the proposition that post-acquisition evidence is entitled to "extremely limited" weight, is inapposite. There, appellant was not allowed to demonstrate that competition continued to exist in the relevant market after the challenged acquisitions because it was within its control to refrain from anticompetitive actions while suit was threatened or pending. *Id.* at 1378.

Certiorari should be granted to correct these plain errors by the court below and thereby avoid serious future misapplications of Section 7 of the Clayton Act.

CONCLUSION

For all of the reasons discussed above, a writ of certiorari should be granted, the decision of the Court of Appeals should be reversed and enforcement of the FTC's divestiture order should be denied.

December 13, 1979

Respectfully submitted,

JOSHUA F. GREENBERG
425 Park Avenue
New York, New York 10022
(212) 759-8400
Counsel for Petitioner

Of Counsel:

ELIZABETH HEAD
DANIEL D. CHAZIN
Kaye, Scholer, Fierman, Hays
& Handler
425 Park Avenue
New York, New York 10022
(212) 759-8400